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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 393 MISC.

RICHARD G. KING,

Petitioner,

v.

THE CALIFORNIA COMPANY, GULF REFINING COMPANY, PLACID OIL COMPANY, TEXAS PACIFIC COAL & OIL COMPANY, AND THE DEVISEES OF SAM GROSS, DECEASED,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 30, 1955, petition for rehearing denied on September 6th, 1956.

Citations to Opinions Below

The opinion of the District Court (R. 191-193) and a supplemental opinion entered nunc pro tunc (R. 228-229) is unreported. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, page 15, is reported

in 224 F. 2d 193. The Judgment below is printed in Appendix B. The opinion of the Circuit Court of Appeals, on petition for rehearing, printed in Appendix C hereto, infra, is reported in — F. 2d —.

Jurisdiction

The opinion (R. 231-238) and judgment (R. 239) of the Circuit Court of Appeals was entered on June 30, 1955. Rehearing was denied on September 6th, 1956 (R. 322). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether an amended complaint filed in the United States District Court, charging the defendants with negligence, trespass, breach of contract, fraud and conspiracy and requesting damages, specific performance, removal of cloud on complainant's title on his real property and reformation of contract constitutes multiple claims within the meaning of amended rule 54 B Federal Rules of Civil Procedure.

Statute Involved

The statutory provisions involved are 28 U. S. Code 2072, and amended rule 54 B Federal Rules of Civil Procedure. They are printed in Appendix A, infra, page 15.

Statement

The suit was originally filed in the Circuit Court of Adams County, Mississippi on May the 8th, 1953 (R. 2-48), alleging ten different and separate claims against the defendants all sounding in tort. Each claim was for surface damage to land, but each claim was for a separate and distinct tract of land separately described in the declaration. The declaration alleges that each tort claim complained of was committed at a different time as well as a different place setting out the time and place (R. 2-35). The defendants removed the case to the United States Dis-

trict Court for the Southern District of Mississippi, Western Division. The jurisdiction of the District Court was invoked because of diversity of citizenship, and the case involved the requisite jurisdictional amount in excess of $3,000.00 exclusive of interest and cost. After the case had been removed to the United States District Court, the appellant filed an amendment to his complaint seeking specific performance under an oil and gas lease contract under which the defendants were operating. On July 12th, 1954, the appellant filed an amendment to the Amended Bill of Complaint requesting certain additional equitable relief (R. 170-171). Again on November 1, 1954, appellant filed another amendment to the Amended Bill of Complaint (R. 171-186) charging breach of contract, fraud. All amendments were made with leave of the court, and appropriate orders were given by the court to make the amendments that were entered. In final form, the Amended Bill of Complaint charged the respondents with negligence, trespass, breach of contract, fraud and conspiracy and sought damages, specific performance and reformation of contract; further, that all clouds be removed from petitioner's title. The respondents filed a Motion For Summary Judgment on certain issues. The district court entered an order (R. 191-193) sustaining the Motion For Summary Judgment filed by respondents.

The respondent's motion was sustained by the District Court on the grounds that petitioner had no cause of action or right for damages for any permanent injuries to the land and real property involved occurring prior to June 1, 1949 for the reason that the plaintiff was not the owner in fee of said lands or real property prior to that date. The petitioner owning only an option to purchase the real property prior to June 1, 1949. The petitioner had no cause of action or right to damages of any kind or character for or on account of anything set forth in his pleadings prior to the date of November 1, 1947, respondents, Gulf Refining Company, for itself, and Placid Oil Company until that date

were the sole operators of the subject lease; the petitioner himself having admitted that the operations on the lease while respondent, Gulf, was operating were done in a reasonable manner. Subsequently by an order entered nunc pro tunc, the district Court noted that an appeal had been taken and that its original order failed to provide as required by Rule 54 B (a) an expressed determination that there is no just reason for delay and (b) an expressed direction for the entry of final judgment entered in order that the Circuit Court of Appeals may be in a position to review the appeal taken from the Summary Judgment, that there is no just reason for delay in the making of an order on the Motion for Summary Judgment presented by the respondents and further ordered that the judgment be entered as set forth in the original order which appears at (R. 191-193). Petitioner appealed to the United States Court of Appeals for the Fifth Circuit on the judgment entered (R. 191-208). Respondents filed A Motion To Dismiss The Appeal (R. 209-227) alleging that the Court of Appeals did not have jurisdiction since the appeal was not from a final judgment nor from an interlocutory order made appealable by statute. Respondent's Motion To Dismiss The Appeal was sustained and judgment entered dismissing the appeal on June 30th, 1955 (R. 239). Petitioner filed A Motion For Additional Time To File A Petition For Rehearing in the Court of Appeals (R. 240-242) which motion was granted and an addition of thirty days time in which to file a motion for rehearing was allowed (R. 243). The Petition For Rehearing And A Brief In Support Thereon was filed in the United States Court of Appeals on August 19th, 1955 (R. 244-317). An order was entered denying the rehearing on September the 16th, 1956 (R. 322).

Reasons for Granting the Writ

1. The decision of the court below in the instant case conflicts with applicable decisions of this court and is therefore

believed to be erroneous. Petitioner's amended complaint in final form presented a case for relief based upon multiple claims. This court in *Sears, Roebuck & Company* v. *Mackey*, 348 U. S. 970, 100 L. Ed. (advance page 780) indicated that the district court is permitted to determine in the first instance the appropriate time when each final decision upon one or more, but less than all the claims in a multiple claims action is ready for appeal. One who is adversely affected by a final decision knows that his time for appeal will not run against him until the District Court makes both an express determination that there is no just reason for delay and an express direction for the entry of judgment. Each of the claims presented by the petitioner in his complaint constituted a claim for relief within the meaning of Rule 54 B. It is apparent that the claims stated are not inseparable or so closely related that they are incapable of separation so that they could not be decided independently of each other. This court has pointed out in the *Mackey case* that the District Court can not in the exercise of its discretion treat as final that which is not final within the meaning of Section 1291 of Title 28, United States Code. The Court did indicate however that the District Court may by the exercise of its discretion, release for appeal final decision upon one or more, but less than all claims in multiple claims actions. Further, the court pointed out that the timing of such a release is vested by the rule primarily in the discretion of the district court as the one most likely to be familiar with the case and with any justifiable reasons for delay. The Court did point out that any abuse of that discretion remains reviewable by the Court of Appeals.

2. The Court of Appeals in denying the Petition For Rehearing indicated that only one claim was involved, that petitioner failed to split several elements into separate counts. This statement apparently, according to the court's reasoning, was based upon a declaration which was filed

in the Mississippi State Court. The declaration which was originally filed in the State Court in Mississippi, however, was not the same complaint in the final amended form which appeared before the United States District Court after the case had been removed.

We are concerned with the problem of whether or not the facts of this case present a case of multiple claims or more than one claim for relief and is, therefore, within the scope of Rule 54 (b). One phase of the suit herein involved is based upon a series of claims by an individual against numerous defendants for acts of tort by an individual defendant or a combination of defendants for separate and distinct claims involving separate and distinct tracts of land and separate and distinct oil wells. The only similarity among the claims is in the theory of the action, in that they are all based on a theory of negligence and all seek damages by way of relief. This is not, as the Circuit Court of Appeals has indicated on page 5 of its opinion, a case of a single claim, that is, a claim for damages to real estate and appellant's right of possession and enjoyment of the land. This is a case wherein the appellant has a separate claim against each defendant individually or in combinations thereof. That each claim is separate, therefore, this is clearly a case of multiple claims. The words of the Circuit Court of Appeals, as found on page 5 of the opinion, "That claim covers a number of years and embraces a large number of alleged *negligent actions on the part of the* appellees or some of them" indicate that in fact these are multiple claims.

On page 7 of the record in this case the Appellant alleged that on or about October 10, 1953 the defendants committed certain acts of negligence on a specific forty-acre drilling unit known as The California Company Lease-Gulf, E. G. Lees Well No. 1, Field, Cranfield, County of Franklin in Section 32, Township 7 North, Range 1 East, Permit No. 3014. On page 70 of the record in the second full paragraph of No. 2 the defendants admitted:

"That on March 27, 1943, defendant Gulf, operating under the basic lease and assignments thereof, began the drilling of the well designated in said Complaint as 'The California Company Lease Gulf E. G. Lees Well No. 1,' the construction of the necessary roads leading thereto and therefrom, the clearing of the necessary drilling site, the digging of necessary pits, all with reference to said well and as a reasonable and necessary part of the drilling of said well and production of minerals therefrom, and that Gulf completed the drilling of said well and brought the same in as a producing oil well on or about August 2, 1945; and, after the necessary equipment, structures, pipe lines and connections were installed, said well was thereupon operated and maintained by Gulf and Placid as a commercial producer of oil and gas until November 1, 1947, when California, as the 'Operator' of the Cranfield Unit, pursuant to the Operating Agreement, copy of which is made Exhibit 2 hereto and the basic lease and assignments thereof, began, and continued to this date, the operation and maintenance of said well (and the facilities, equipment, pipe lines and structures thereunto appertaining) as a commercial producer of oil and gas on behalf of all parties to said Operating and Unitization Agreements.

Defendants aver that the respective defendant, in the performance of such acts, as hereinabove admitted and alleged in this paragraph of the Answer, exercised at all times due and reasonable care, and aver that only so much of the surface of said lands was taken and used in such manner and for such periods of time as was reasonably necessary to carry out the purposes, and as was within and pursuant to the terms, of the basic lease, the assignments thereof and the said Unitization and Operating Agreements and in order to utilize, and realize the benefits of, the estate granted or inuring to defendants and to the royalty owners."

On page 11 of the Record the Appellant herein charges that the defendants committed certain negligent acts on "The California Company Lease-Gulf E. G. Lees Lease Well No. 3 Cranfield, County, Franklin, Section 32, Township 7 North, Range 1 East, Permit No. 7057". On page 72 of the Record, in Appellees' Answer to the Complaint, the defendant Gulf admits operating under the basic lease and assignments thereof and began the drilling of the well designated in the Complaint as "The California Company Lease Gulf E. G. Lees No. 3."

The appellant, on page 13 of the Record in his complaint charged that the defendants committed certain negligent acts with respect to "The California Company lease Gulf E. G. Lees Lease Well No. 5 Field Cranfield, County of Franklin Sec. 32, Twp. 7 N., Rge 1E. Permit No. 7067". On page 73 of the Record, paragraph (4) of the appellees' Answer to the complaint, the defendants admit that on or about April 10, 1946, the defendant, Gulf, operating under the basic lease and assignments thereof, began the drilling of the well designated in said Complaint as "The California Company Lease Gulf E. G. Lees No. 5."

Appellant charged the defendants that on July 8th, 1945 they committed certain negligent acts with respect to Well No. 7. Appellees herein admitted that on June 25th, 1946, defendant Gulf, operating under the basic lease and assignments thereof, began the drilling of the well designated in said complaint as "The California Company Gulf E. G. Lees No. 7."

Appellant charged, on page 17 of the Record, in his complaint that the defendants on or about the 19th day of September, 1945 committed certain negligent acts with respect to Well No. 11. The appellees, in their Answer below, page 77 of the record, admitted that on or about December 19th, 1946 defendant Gulf, operating under the basic lease and assignments thereof, began drilling the well designated as Well No. 11.

Appellant charged that defendants, on or about December 3rd, 1945, were committing certain negligent acts with respect to Well No. 12. Appellees, in their Answer, page 78 of the record, admit that on or about February 18, 1947 the defendant Gulf, operating under the basic lease and assignments thereof, began the drilling of well designated as Well No. 12.

Appellant herein charged, on page 19 of the Record, in his complaint, that the defendants committed certain acts on or about January 5th, 1946 which were negligent with respect to Well No. 9. Defendants, appellees herein, on page 80 of the record, *admit that defendant California*, as the Operator of the Cranfield Unit, operating under the basic lease, the assignments thereof, and the Unitization Agreement, began the drilling of the well designated as "The California Company E. G. Lees Cranfield Unit Well No. 9."

On page 21 of the record, appellant herein charged that on or about May 14th the defendants committed certain negligent acts with respect to *Well No. 17*. Appellees herein, in their Answer, Record page 81, admitted that on or about August 5th, 1947 the defendant Gulf, operating under the basic lease and assignments thereof, began the drilling of the well designated in said complaint as "The California Company Lease Gulf E. G. Lees Well No. 17" for the production of minerals therefrom.

Appellant herein charged, on page 22 of the Record, in his complaint, that the defendants committed certain negligent acts with respect to *Well No. 7*. On page 83 of the Record, appellees herein admitted in their Answer that the defendant California, as the Operator of the Cranfield Unit, operating under the basic lease, the assignments thereof, and the Unitization Agreement, began the drilling of the well designated in the Complaint as "The California Company lease E. G. Lees Cranfield Unit Well No. 7."

Appellant charged, page 23 of the record, in his complaint that the defendant did commit certain negligent acts with respect to "The California Company Lease Gulf E. G. Lees *Well No. 8* Field Cranfield, County Adams Sec. 49 Twp. 7 N, Rge. 1 W. Permit No. 7081". Appellees herein, in their Answer to the complaint, did admit, Record page 85, that on or about September 29th, 1946, defendant Gulf, operating under the basic lease and assignments thereof, began the drilling of the well designated in said complaint as "The California Company Lease Gulf E. G. Lees Well No. 8."

It is to be noted in each of the aforementioned references to the record that each and every well is located on a separate tract accurately described in the complaint and constitutes a separate and distinct charge sounding in tort against the defendants with respect to each and every separate and distinct unit, occurring at a different time and different place, involving different facts and evidence. Some of the wells are located in Adams County and some in Franklin County.

It is apparent from the pleadings filed in the case by complainant, and the defendants' Answer thereto in particular, that each of these defendants regarded these particular charges as separate and distinct as to them.

It is to be noted on page 143 of the record the Defendant, Texas Pacific Coal and Oil Company, deny that it is liable for any claim for damages occurring or accruing prior to January 1, 1949 at 7 A. M., because it did not become a party to said operating Agreement of November 1, 1947 until January 1, 1949.

The defendant Texas Pacific Coal and Oil Company specifically denies that it could be held liable for damages, but admitted that it could be held liable for its proportionate part of the damages occurring or accruing after January 1, 1949 at 7 A. M., if any damages are assessed.

On page 144 of the Record, the defendant Sam Gross stated that he did not join the Operating Agreement or become in any way connected with the operations on the lands, and, therefore, could not be held liable for any matter or thing alleged in the complaint occurring or antedating July 9, 1949, which was the date he first acquired any interest to the property.

It is quite apparent that the several defendants considered the claims alleged in the complaint to be several, separate and distinct. The only similarity of these claims is that they all sound in tort; the mere fact that each of these claims sounds in tort does not make this an action involving a single claim. Furthermore, it is a customary practice in modern oil field development for the major companies to develop and explore the field through the medium of subcontractors. These drilling contractors are many and varied. Furthermore, each drilling contractor will have different personnel coming from different places of the country, and the tort, therefore, is committed by different individuals in each and every case.

It seems patently clear that this case involves multiple claims. The appellant herein could have filed suit against these defendants in the United States Federal District Court, assuming the jurisdictional amount was present, for any one of these torts alleged in his original complaint. It is to be noted that each and every one of these separate and distinct claims was committed at a different period of time, on a different tract of land and by different personnel.

Not only does the information delineated above reflect separate claims, although commonly sounding intort and seeking a remedy of damages, the amendment to the complaint filed December 1, 1953 by the appellant herein, appearing on page 136 of the Record, seeks specific performance. The specific performance sought is entirely a separate and different claim from the other claims. The specific performance amendment is based upon the oil and gas lease

form in which the lessees agreed to maintain the premises in a particular manner. The specific performance requested entailed the requiring of the burying of certain pipes on the part of the defendants. It is to be noted that the remedy of specific performance is one peculiar in Mississippi to the Court of Chancery. The remedy of damages for cases sounding intort is one peculiar to the Courts of Law, or Circuit Courts of Mississippi. Here, again, is a separate and distinct claim, separate and apart from the tort claims charged against each and every defendant.

It is apparent that the United States Federal District Judge for the Southern District of Mississippi viewed these claims as multiple. There would be no other reason for his entering an order for a partial summary judgment making the express findings and determination as required and the issuance of his certificate thereon, unless it was to be a final adjudication as set forth in the Rule 54 (b).

Moreover, in addition to the tort claims filed in the original declaration, the first phase of this suit, herein set out, and in addition to the specific performance requested, (R. 136) petitioner in his final amendments R. 170-171 and 171-186 requested:

> A. General Equitable relief
>
> B. Requested the contract between Blanchard (Petitioner's predecessor in title) and defendant companies dated 15 January, 1946 be reformed so as to conform with the original oil and gas lease dated 16 December 1941. (action in rem).

C. Action against defendant on breach of contract.

D. Action based on Fraud and conspiracy committed by defendant companies against the petitioner—(Damages requested).

E. Action based upon Trespass by defendants upon petitioners realty. (Damages requested).

F. Requested all instruments of record after 15 Septem-

ber, 1944 (date petitioner took possession of land under purchase and sell agreement) between Blanchard and defendants company be cancelled as they cast a cloud on petitioners title and further request title be confirmed into petitioner,—(action in rem—Mississippi Chancery Court has exclusive Jurisdiction of this matter when brought in State Courts).

The Summary Judgment by the trial court dismissed:

1. All of petitioners Tort claims prior to 1 June, 1949
2. His action for Specific Performance
3. General Equitable relief
4. Denied him the right to have the contract of 15 January, 1946 between Blanchard and defendants companies to be conformed to the oil and gas lease of 16 December, 1949
5. Denied his Breach of Contract action
6. Denied his action on Fraud
7. Denied his action in Trespass
8. Denied his request to remove the clouds on the title to his property.

The Summary Judgment left the petitioner with his Tort claims committed subsequent to 1 June, 1949.

It is felt by the petitioner that the decision of the Court of Appeals for the Fifth Circuit is in conflict with the recent decision of this Court in *Sears, Roebuck & Company* vs. *Mackey,* 348 U. S. 970, 100 L. Ed. (advance p. 780). Petitioner urges that as a matter of policy, this court should grant certiorari in this case in order to prevent any misunderstanding of its decision rendered in the *Mackey* case. It is felt that if this decision rendered by the Court of Appeals for the Fifth Circuit is allowed to stand, it will constitute a deviation from the pattern laid down by this court in the *Mackey* case and ultimately result in the conflict among the several Courts of Appeals and within the several Courts of Appeals.

Conclusion

For the foregoing reason, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15486

RICHARD G. KING, APPELLANT,

versus

THE CALIFORNIA COMPANY, GULF REFINING COMPANY, PLACID OIL COMPANY, TEXAS PACIFIC COAL & OIL COMPANY and SAM GROSS, APPELLEES

Appeal from the United States District Court for the Southern District of Mississippi

(June 30, 1955)

Before Rives, and Cameron, Circuit Judges, and Dawkins, District Judge

CAMERON, *Circuit Judge:*

The question involved here is whether a partial summary judgment entered by the court below is subject to appeal under applicable statutes. A skeleton outline of the facts upon which the summary judgment was entered is necessary to an understanding of the issue presented on the motion to dismiss.

Appellant King, as plaintiff, sued four oil companies and one individual, appellees here, for damages alleged to have accrued to him from what he charged to be illegal, wilful and negligent actions by or on behalf of the appellees incident to the drilling and operating of ten oil wells on the lands involved.

According to the complaint appellee entered into possession September 15, 1944 of said lands under what that pleading calls a Conditional Sales Contract, and held posses-

sion until the time of filing suit, a warranty deed being executed to appellee June 1, 1949. Prior to the former date the owner of said lands had given an oil and gas lease, title to which had come into appellees. The drilling operations under this lease, as well as operation of producing wells, were carried on by appellee, Gulf Refining Company, on behalf of some or all appellees until November 1, 1947, whereupon appellee, The California Company, took over said operations on behalf of the appellees.

The gravamen of the complaint is that said operations were conducted throughout in a negligent, wilful and illegal manner in that the contents of slush pits were bulldozed onto fertile pastures and cultivated fields, destroying live springs and creating latent hazards which ultimately resulted in destruction of farm equipment; sludge and salt water were discharged onto the lands and into the streams; fences were destroyed, roads negligently built, fires set out and transmitted to timber, and other similar destructive acts were performed. These allegedly negligent and illegal acts, growing out of the drilling and operation of the oil wells by said two operators caused various items of damage to appellant which may be summed up as damage to the surface of the lands, destruction of timber, destruction and damage to farm equipment, the killing of livestock, and the ultimate forcing of appellant out of the dairy business.

Appellees filed a motion for summary judgment based upon the pleadings, the deposition of appellant and affidavits, and directel against certain of the damages claimed by appellant, to-wit any damages accruing prior to November 1, 1947, on the ground that appellant admitted in his deposition that the operations conducted by Gulf were properly conducted; and any damages predicated upon claimed permanent injuries to the land itself preceding the delivery to appellant of the warranty deed of June 1, 1949 on the ground that, prior thereto, appellant was occupying the land under the contract of September 15, 1944 which was, in effect, nothing more than an option.

After an extended argument the district court rendered an unpublished opinion, holding with appellees on both asserted grounds, and entered a summary judgment denying the right to recover on the items of damage above set out.[1]

Appellant prosecuted this appeal from that order by filing, on the date of its entry, a petition for appeal and obtaining from the district court an order allowing the appeal and, at the same time, giving notice of appeal pursuant to Rule 73 F.R.C.P., which was later followed by proper bond. Some months later, after the record had been filed in this court and appellees had moved to dismiss the appeal, the district court entered a *nunc pro tunc* order under Rule 54(b) F.R.C. P.[2]

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[1] The order provides in part the following:

"It is, therefore, hereby ordered that the motion of said defendants for summary judgment as to the subject matter therein presented be and the same is hereby sustained and granted, and accordingly it is hereby ordered:

1. That plaintiff has no cause of action or right for damages for any permanent injuries to the land and real property involved in this cause occurring prior to June 1, 1949 for the reason that plaintiff was not the owner in fee of said lands or real property prior to said date, said plaintiff owning only an option to purchase said real property prior to June 1, 1949.

2. That plaintiff has no cause of action or right to damages of any kind or character for or on account of anything set forth in his pleadings prior to the date of November 1, 1947, defendant, Gulf Refining Company, for itself and Placid Oil Company, until said date being the sole operator of subject lease, the said plaintiff himself having admitted that the operations on said lease while Gulf was operating were done in a reasonable manner."

[2] This order, duly certified by the clerk of the district court and appearing in the record here, provides the following:

"It appearing that the order entered herein on November 15, 1954, and from which an appeal has been taken, fails to provide as required by Rule 54(b):

(a) An express determination that there is no just reason for delay and

(b) An express direction for the entry of final judgment.

Now, therefore, in order that the Circuit Court of Appeals may be in a position to review on the appeal taken from the summary judgment entered herein;

It is hereby ordered that there is no just reason for delay in the making of an order on the motion for summary judgment presented by defendants;

We think that the motion to dismiss the appeal is well taken. The right to appeal is based upon statute, and our jurisdiction is limited by the provisions of 28 U.S.C.A. 1291 and 1292.[3] It is clear that the judgment before us does not come within the ambit of either of those statutes. It is in no sense a final judgment. It is not final as to all parties or as to any party or as to the whole subject matter of the litigation or any facet of it. It does not terminate the litigation and does not grant any relief to appellant or against the appellees.[4]

The complaint here sets out one single claim, to-wit a claim for damages to real estate and appellant's right of possession and enjoyment thereof. That claim covers a number of years and embraces a large number of alleged negligent actions on the part of the appellees or some of them. The judgment does not seek to adjudicate that claim. It purports only to limit appellant's right to recover certain of the items of damage claimed.

Further ordered that judgment be entered as set forth in the original order which appears at pages 191 to 193 of the transcript.

It is further ordered that this supplemental order be considered as rendered *nunc pro tunc.*"

[3] Sec. 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

Sec. 1292. *Interlocutory decisions*

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

[4] Cf. United States Sugar Corp. v. Atlantic Coast Line R.R. Co., (5th Cir. 1952) 196 F.2d 1015 and Tauzin v. St. Paul Mercury Indemnity Co. (5 Cir. 1953), 195 F.2d 223.

If, as ruled by the court below (a question we do not reach here), appellant is not entitled to recover damages for any permanent injuries to the land, he is still entitled, if he can make the proper proof, to recover those elements of damage in which he had an interest under the terms of the estate by which he possessed the land.

If appellant is barred from recovery of damages accruing during a certain period involved in his civil action, he may, nevertheless, with like proof, be entitled to recover damages accruing during the other years embraced in his complaint.[5] Moreover, there is nothing final in the determination made by the district court. When it hears the case on the merits, it may have a different idea about the impact of this testimony. What we said in *United States Sugar Corp.* v. *Atlantic Coast Line R.R. Co., supra*, applies here: "Appellant points out that the order appealed from constitutes a determination of the basic question here involved. But the views of the district judge implicit in the order have not yet assumed finality. Until final judgment, he is at liberty to alter them."

We do not understand that it is seriously argued that this partial summary judgment is such an interlocutory order as will serve as the basis for appeal under 28 U.S.C.A., Sec. 1292. Such a contention, if made, is fully answered by Professor Moore in his Treatise on Federal Practice,

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[5] Such a time factor was involved in Coffman v. Federal Laboratories (3 Cir. 1948), 171 F.2d 94, Cert. den. 336 U.S. 913, 69 S. Ct. 603. Summary judgment had been granted with respect to royalties over a certain time period. Responding to the claim that recovery for a different time period was barred by that judgment from which no appeal had been taken, the court said: "Rule 54(b) provides for a final judgment upon one claim in a suit predicated upon two or more claims. It is clear, however, that there must be differing occurrences or transactions which form the basis of separate units of judicial action before such a judgment can be entered under that rule. The fact that this claim was divided into several parts in the findings of fact • • • does not make what is essentially a single claim into several claims arising out of wholly separate and distinct transactions or engagements."

See also Tye v. Hertz, etc. Co. (3 Cir. 1949), 173 F.2d 317.

Second Edition, Volume 6, Sections 56.20(4), et seq; and see also our cases cited in Note 4 *supra*, and *Lewis v. E. I. du Pont de Nemours*, 5 Cir. 1950, 183 F. 2d 29, and *Crummer et al. v. du Pont, et al*, 5 Cir. 1952, 196 F. 468. A partial summary judgment allowing or disallowing recovery on part of a single claim is interlocutory, and, unless made appealable by the statute, is non-appealable; and the terms of the statute do not provide for appeal in such a case as we have here.

It is equally clear that appellant's rights with respect to appeal are not affected by the certificate given by the court below under Rule 54(b) F.R.C.P.[6] That rule applies by its terms only to partial summary judgments where multiple claims are involved. We have no such situation here. The claim is single and relates to a series of negligent or illegal actions alleged to have been committed by appellees.[7] It is clear, therefore, that a certificate of the trial judge under that rule cannot have the effect of conferring jurisdiction where none is given by statute or of withdrawing jurisdiction where the statute confers it.

We do not find it necessary to enter the controversy which the Court of the Seventh Circuit depicts in *Mackey, et al v. Sears, Roebuck & Co.*, 7 Cir. 1955, 218 F.2d 295, as in progress between the circuits and, in one instance, panels within the same circuit involving the effect of the certificate on the question of the finality of the judgment. Professor

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[6] Where appellant had perfected his appeal and had demonstrated that he was apprehensive of being caught by *res judicata* it was not improper for the trial court to give the certificate out of abundance of caution so that no unnecessary impediment would be in the way of appellant's presentation of his contentions to this court.

[7] The Court of Appeals of the Seventh Circuit dealt with a situation much like this one in Leonard v. Socony, etc. Oil Co., 1942, 130 F.2d 535, when it dismissed an appeal because the partial summary judgment related only to items of damage:

"In essence, defendants' motion was nothing more than one to strike certain matters and the judgment only interlocutory,—a pretrial order determining for the purposes of the trial a legal contention affecting only certain elements of damage."

Moore discusses that conflict [8] at length and also treats fully the effect of a certificate on interlocutory orders [9] such as the one now under consideration. Nor are we confronted with the exception illustrated by cases like *Forgay v. Conrad* [10] wherein the courts have sought to protect parties from irreparable injury arising, for the most part, in proceedings *in rem* where the order disposes of the *res*. Those situations do not arise under the facts here.

We have before us a simple case without multiple claims in which the court below has entered an interlocutory order relating to items of damage alone. It is plain that no prejudice can be done appellant by being required to try the case on the merits. No rights will be foreclosed by the summary judgment from which the appeal is taken and the correctness of the ruling of the distinct court can be challenged if and when the case comes before this court on an appeal from final judgment. [11]

As stated, we do not reach for decision the questions appellant sought to present by this appeal and hold merely that the statutes do not invest us with jurisdiction to hear those questions. The appeal is therefore

Dismissed.

A True Copy:

Teste:

JOHN A. FEEHAN, JR.,
Clerk.

By GILBERT F. ————,
Deputy Clerk of the United States Court of Appeals for the Fifth Circuit.

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[8] 6 Moore's Federal Practice, (Second Edition) pp. 221, *et seq.* and 227 *et seq.*

[9] Ib. pp. 230, et seq.

[10] 6 Howard 201, 12 L. Ed. 404; and see the discussion of this case in 6 Moore, (Second Edition) pp. 237, *et seq.*

[11] Under the liberal practice effective in this circuit even the cost of preparing the record now before us will not be lost. In any future appeal either party may use the portions of the transcript already prepared without reprinting it.

APPENDIX B

JUDGMENT

Extract from the Minutes of June 30, 1955.

No. 15486

RICHARD G. KING

versus

THE CALIFORNIA COMPANY, GULF REFINING COMPANY, PLACID OIL COMPANY, TEXAS PACIFIC COAL & OIL COMPANY and SAM GROSS

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed;

It is further ordered and adjudged by this Court that the appellant, Richard G. King, and the sureties on the appeal bond herein, George J. Guido and Edward J. Foley, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15486

RICHARD G. KING, APPELLANT

versus

THE CALIFORNIA COMPANY, GULF REFINING COMPANY, PLACID OIL COMPANY, TEXAS PACIFIC COAL & OIL COMPANY and SAM GROSS, APPELLEES

Appeal from the United States District Court for the Southern District of Mississippi.

(September 6, 1956.)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and DAWKINS, District Judge.

CAMERON, Circuit Judge: Following our opinion rendered in this case June 30, 1955, 224 F.2d 193, appellant filed a petition for rehearing earnestly insisting that our decision was erroneous and in conflict with decisions in other reported cases,[1] chief among which was *Mackey* v. *Sears, Roebuck & Co.*, 7 Cir., 1955, 218 F.2d 295. Our attention was called to the fact that the Supreme Court had granted certiorari in that case, [2] and we were asked to defer our decision on the petition for rehearing until the Supreme Court had decided it. This we have done, and now the decision of the Supreme Court [3] is before us. We find nothing therein which conflicts with our original opinion.

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[1] Listed in 351 U.S. at p. 429.
[2] 348 U.S. 970.
[3] Sears, Roebuck & Co. v. Mackey, 1956, 351 U.S. 427.

Mackey had filed his action in four separate counts.[4] And, as the Supreme Court points out (p. 430), each of these counts arose out of separate and independent transactions or occurrences except that Counts I and II related to different phases of the same transaction. Counts I and II were dismissed, and Counts III and IV were retained and the trial Court certified, under Rule 54(b) F.R.C.P. as amended, that there was no just reason for delay. That question did not arise here because the complaint embraced only one *claim* (cause of action under common law pleading).

Appellant recognized that only one claim was involved by failing to split the several elements into separate counts.[5] It charges, "That the *cause of action herein complained of* accrued from the doing of such business and the performing of such work . . . [and] this Court has venue of *said cause.*" [Emphasis added.] Paragraphs numbered 2 through 11 of the complaint describe the drilling of ten oil wells on the land claimed by appellant and set up the acts of negligence or contract violation alleged to have been committed in each instance. But paragraphs 12 through 21 describe the various kinds of damage alleged to have been sustained by appellant, and all of these items of damage relate to all ten wells.

Paragraph 22 itemizes these damages, allocating to the

---

[4] Cf. 2 Moore's Federal Practice, 2d Ed., § 2.06[2] and § 8.31 and § 10.03; and also 3 Moore § 18.03 et seq. Rule 10(b) F.R.C.P. provides, "Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count, . . . whenever a separation facilitates the clear presentation of the matters set forth."

[5] The "declaration" was filed in a state court of Mississippi in one count. Under the rules of pleading in effect in the state court, the common law practice, 71 C.J.S., Pleading, § 90 et seq., and 41 Am. Jur., Pleading, § 107 et seq., was in effect and required that each cause of action be set forth in a separate and distinct count complete in itself and self-sufficient. Sutherland v. Buckeye Cotton Oil Co., U.S. D.C. S.D. Miss., Holmes, Judge, 259 F.909, and cf. Illinois Central Railroad Co. v. Abrams, 1904, S. Ct. Miss., 36 So. 542; J.J. Newman Lumber Co. v. Dantzler, 1914, S. Ct. Miss., 64 So. 931; City of Meridian v. Sullivan, 1950, S. Ct. Miss., 45 So.2d. 851.

various elements monetary amounts adding up to $100,-200.00 and no effort is made to separate the damages as to wells. The *ad damnum* paragraph of the complaint demands judgment for that amount against appellees, and again no effort is made at separation of the damages.

Both the form and the content of the complaint demonstrate clearly that multiple claims are not involved, and the record reveals that the rulings of the Court below from which the appeal is prosecuted related to items of damage alone and not to any claim for relief.

The petition for rehearing is

Denied.

A True Copy:

Teste:

—— ——,

Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX D

SEARS, ROEBUCK AND COMPANY, a New York Corporation, Petitioner

V.

BRUCE A. MACKEY, Individually and Time Saver Tools, Inc., an Illinois Corporation, 348 U. S. 970, 100 L. Ed. (advance p. 780)

No. 34

Argued February 28, 1956. Decided June 11, 1956.

ON WRIT of Certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit denying an appellee's motion to dismiss the appeal for lack of jurisdiction. Affirmed.

See same case below, 218 F. 2d 295.

Walter J. Rockler, of Chicago, Illinois, argued the cause for petitioner.

Edward I. Rothschild, of Chicago, Illinois, argued the cause for respondents.

Mr. Justice Burton delivered the opinion of the Court.

This action, presenting multiple claims for relief, was brought by Mackey and another in the United States District Court for the Northern District of Illinois, Eastern Division, in 1953. The court expressly directed that judgment be entered for the defendant, Sears, Roebuck & Co., on two, but less than all, of the claims presented. It also expressly determined that there was no just reason for delay in making the entry. After Mackey's notice of appeal from that judgment to the Court of Appeals for the Seventh Circuit, Sears, Roebuck & Co. moved to dismiss the appeal for lack of appellate jurisdiction. The Court of Appeals upheld its jurisdiction and denied the motion, relying upon 28 U.S.C. § 1291 and Rule 54(b) of the Federal Rules of Civil Procedure, as amended in 1946. 218 F. 2d 295. Because of the importance of the issue in determining appellate jurisdiction and because of a conflict of judicial views on the subject,[1] we granted certiorari.

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[1] For decisions directly or impliedly sustaining the validity of amended Rule 54(b), as applied in the instant case, see Rieser v Baltimore & O. R. Co. 224 F2d 198 (CA2d Cir), and cases cited at 203, note 7; United Artists Corp. v. Masterpiece Productions, Inc. 221 F2d 213 (CA2d Cir); Clarksville v United States, 198 F2d 238 (CA4th Cir); Boston Medical Supply Co. v Lea & Febiger, 195 F2d 853 (CA1st Cir); Bendix Aviation Corp. v Glass, 195 F2d 267, 38 ALR2d 356 (CA3d Cir); Lopinsky v Hertz Drive-Ur-Self Systems, Inc. 194 F2d 422 (CA2d Cir), concr. op. of Judge Clark, at 424–430; Pabellon v Grace Line, Inc. 191 F2d 169 (CA2d Cir). See 6 Moore's Federal Practice (2d ed 1953) 220–230, and Note, 62 Yale LJ 263.

Contra: See Rieser v Baltimore & O. R. Co., supra, concr. op. of Judge Frank, at 205–208; Bendix Aviation Corp. v Glass supra, concr. op. of Judge Hastie, at 277–282; Pabellon v Grace Line, Inc. supra, concr. op. of Judge Frank, at 176–181; Flegenheimer v General Mills, Inc. 191 F2d 237 (CA2d Cir). See also, Gold Seal Co. v. Weeks, 93 App DC 249, 209 F2d 802.

348 U. S. 970, 99 L. Ed. 755, 75 S. Ct. 535. For the reasons hereafter stated, we sustain the Court of Appeals and its appellate jurisdiction.

Although we are here concerned with the present appealability of the judgment of the District Court and not with its merits, we must examine the claims stated in the complaint so as to consider adequately the issue of appealability.

The complaint contains six counts. We disregard the fifth because it has been abandoned and the sixth because it duplicates others. The claims stated in Counts I and II are material and have been dismissed without leave to amend. The claim contained in Count III and that in amended Count IV are at issue on the answers filed by Sears, Roebuck & Co. The appeal before us is from a judgment striking out Counts I and II without disturbing Counts III and IV, and the question presented is whether such a judgment is presently appealable when the District Court, pursuant to amended Rule 54(b), has made "an express determination that there is no just reason for delay" and has given "an express direction for the entry of judgment."

In Count I, Mackey, a citizen of Illinois, and Time Saver Tools, Inc., an Illinois corporation owned by Mackey, are the original plaintiffs and the respondents here. Sears, Roebuck & Co., a New York corporation doing business in Illinois, is the original defendant and the petitioner here. Mackey charges Sears with conduct violating the Sherman Antitrust Act in a matter prejudicial to three of Mackey's commercial ventures causing him $190,000 damages, for which he seeks $570,000 as treble damages. His first charge is unlawful destruction by Sears, since 1949, of the market for nursery lamps manufactured by General Metalcraft Company, a corporation wholly owned by Mackey. Mackey claims that this caused him a loss of $150,000. His second charge is unlawful interference by Sears, in 1952, with Mackey's contract to sell, on commission, certain tools and

other products of the Vascoloy-Ramet Corporation, causing Mackey to lose $15,000. His third charge is unlawful destruction by Sears, in 1952, of the market for a new type of carbide-tipped lathe bit and for other articles manufactured by Time Saver Tools, Inc., resulting in a loss to Mackey of $25,000. Mackey combines such charges with allegations that Sears has used its great size to monopolize commerce and restrain competition in these fields. He asks for damages and equitable relief.

In Count II, Mackey claims federal jurisdiction by virtue of diversity of citizenship. He incorporates the allegations of Count I as to the Metalcraft transactions and asks for $250,000 damages for Sears' wilful destruction of the business of Metalcraft, plus $50,000 for Mackey's loss on obligations guaranteed by him.

In Count III, Mackey seeks $75,000 in a common-law proceeding against Sears for unlawfully inducing a breach of his Vascoloy commission contract.

In Count IV, Time Saver seeks $200,000 in a common-law proceeding against Sears for unlawfully destroying Time Saver's business by unfair competition and patent infringement.

The jurisdiction of the Court of Appeals to entertain Mackey's appeal from the District Court's judgment depends upon 28 U. S. C. § 1291, which provides that "The courts of appeals shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States. . . ." (Emphasis supplied.)

If Mackey's complaint had contained only Count I, there is no doubt that a judgment striking out that count and thus dismissing, in its entirety, the claim there stated would be both a final and an appealable decision within the meaning of § 1291. Similarly, if his complaint had contained Counts I, II, III and IV, there is no doubt that a judgment striking out all four would be a final and appealable decision under § 1291. The controversy before us

arises solely because, in this multiple claims action, the District Court has dismissed the claims stated in Counts I and II, but has left unadjudicated those stated in Counts III and IV.[2]

Before the adoption of the Federal Rules of Civil Procedure in 1939, such a situation was generally regarded as leaving the appellate court without jurisdiction of an attempted appeal. It was thought that, although the judgment was a final decision on the respective claims in Counts I and II it obviously was not a final decision of the whole case, and there was no authority for treating anything less than the whole case as a judicial unit for purposes of appeal.[3] This construction of the judicial unit was developed from the common law which had dealt with litigation generally less complicated than much of that of today.[4]

Headnote 1

With the Federal Rules of Civil Procedure, there came

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[2] Sears also contends that the Court of Appeals misconstrued amended Rule 54(b). See Flegenheimer v General Mills, Inc. (CA2d Vt) 191 F2d 237, supra. The meaning of that rule is considered hereafter.

[3] At common law, a writ of error did not lie to review a judgment that failed to adjudicate every cause of action asserted in the controversy. See Holcombe v McKusick (US) 20 How 552, 15 L ed 1020; United States v Girault (US) 11 How 22, 13 L ed 587; Metcalfe's Case, 11 Co Rep 68, 77 Eng Rep 1193. The rule generally followed in the federal courts was that, in a case involving a single plaintiff and a single defendant, a judgment was not appealable if it disposed of some, but less than all, of the claims presented. See Collins v Miller, 252 US 364, 64 L ed 616, 40 S Ct 347; Sheppy v Stevens, 200 F 946 (CA2d Cir). In cases involving multiple parties where the alleged liability was joint, a judgment was not appealable unless it terminated the action as to all the defendants. See Hohorst v Hamburg-American Packet Co. 148 US 262, 37 L ed 443, 13 S Ct 590. But if, in a multiple party case, a judgment finally disposed of a claim that was recognized to be separate and distinct from the others, that judgment, under some circumstances, was appealable. See Republic of China v American Express Co. 190 F2d 334 (CA2d Cir).

Headnote 1
Headnote 2

[4] The appellate jurisdiction of the United States Courts of Appeals, with exceptions not directly pertinent here, is still largely restricted to the review of cases appealed under 28 USC § 1291. But see Forgay v Conrad (US) 6 How 201, 12 L ed 404; Cohen v Beneficial Industrial Loan Corp. 337 US 541, 93 L ed 1528, 69 S Ct 1221; 28 USC §§ 1292,

an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims. Largely to meet this need, in 1939, Rule 54(b) was promulgated in its original form through joint action of Congress and this Court.[5] It read as follows:

"(b) JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement

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[5] The Supreme Court's authority to promulgate the Federal Rules of Civil Procedure is derived from the Enabling Act, now appearing as USC § 2072. It authorizes this Court to promulgate rules governing "the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States . . . in civil actions." It provides that such rules "shall not abridge, enlarge or modify any substantive right. . . ." And, by reason of Headnote 3 Article 1, § 8 of the Constitution, it has been held repeatedly that only Congress may define the jurisdiction of the lower federal courts. See Sibbach v Wilson & Co. 312 US 1, 85 L ed 479, 61 S Ct 422; Baltimore Contractors, Inc. v. Bodinger, 348 US 176, 99 L ed 233, 75 S Ct 249; and Fed Rules Civ Proc, 82. "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." 28 USC § 2072.

until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

It gave limited relief. The courts interpreted it as not relaxing the requirement of a "final decision" on each individual claim as the basis for an appeal, but as authorizing a limited relaxation of the former general practice that, in multiple claims actions, *all* the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them.[6] Thus, original Rule 54(b) modified the single judicial unit theory but left unimpaired the statutory concept of finality prescribed by § 1291. However, it was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability. The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased.

Headnote 4

Largely to overcome this difficulty, Rule 54(b) was amended, in 1946, to take effect in 1948.[7] Since then it has read as follows:

"(b) JUDGMENT UPON MULTIPLE CLAIMS. *When more*

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[6] See Pabellon v Grace Line, Inc. supra (191 F2d at 174).

[7] ". . . situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question." Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70-71 (June 1946).

than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, *the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Emphasis supplied.)

In this form, it does not relax the finality required of each decision, as an individual claim, to render it appealable, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case. The amended rule does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which "one or more but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal.

Headnote 5

Headnote 6

To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal. This arrangement already has lent welcome certainty to the appellate procedure. Its "negative effect" has met with uniform approval. The effect so referred to is the rule's specific requirement that for "one or more but less than all" multi-

Headnote 7

ple claims to become appealable, the District Court must make both "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment." A party adversely affected by a final decision thus knows that his time for appeal will *not* run against him until this certification has been made.[8]

Headnote 8

In the instant case, the District Court made this certification, but Sears, Roebuck & Co. nevertheless moved to dismiss the appeal for the lack of appellate jurisdiction under § 1291. The grounds for such a motion ordinarily might be (1) that the judgment of the District Court was not a decision upon a "claim for relief," (2) that the decision was not a "final decision" in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order.

Headnote 9

In the case before us, there is no doubt that each of the claims dismissed is a "claim for relief" within the meaning of Rule 54(b), or that their dismissal constitutes a "final decision" on individual claims. Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other.

Headnote 10

Petitioner contends that amended Rule 54(b) attempts to make an unauthorized extension of § 1921. We disagree. It could readily be argued here that the claims stated in Counts I and II are sufficiently independent of those stated in Counts III and IV to satisfy the requirements of Rule

Headnote 11

[8] For favorable comment on this aspect of the rule, see Dickinson v Petroleum Conversion Corp. 338 US 507, 511, 512, 94 L ed 299, 302, 70 S Ct 322.

54(b) even in its original form. If that were so, the decision dismissing them would also be appealable under the amended rule. It is nowhere contended today that a decision that would have been appealable under the original rule is not also appealable under the amended rule, provided the District Court makes the required certification.

While it thus might be possible to hold that in this case the Court of Appeals had jurisdiction under original Rule 54(b), there at least would be room for argument on the issue of whether the decided claims were separate and independent from those still pending in the District Court.[9] Thus the instant case affords an excellent illustration of the value of the amended rule which was designed to overcome that difficulty. Assuming that the re-

Headnote 12

quirements of the original rule are not met in this case, we nevertheless are enabled to recognize the present appellate jurisdiction of the Court of Appeals under the amended rule. The District Court *cannot*, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any

Headnote 13

justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals.

---

[9] In the instant case, the claim dismissed by striking out Count I is based on the Sherman Act, while Counts III and IV do not rely on, or even refer to, that Act. They are largely predicated on common-law rights. The basis of liability in Count I is independent of that on which the claims in Counts III and IV depend. But the claim in Count I does rest in part on some of the facts that are involved in Counts III and IV. The claim stated in Count II is clearly independent of those in Counts III and IV.

Rule 54(b), in its original form, thus may be said to have modified the single judicial unit practice which had been developed by court decisions. The validity
Headnote 14 of that rule is no longer questioned. In fact, it was applied by this Court in *Reeves* v. *Beardall*, 316 U. S. 283, 86 L. Ed. 1178, 62 S. Ct. 1085, without its validity being questioned.

Rule 54(b), in its amended form, is a comparable exercise of the rule-making authority of this Court. It does not supersede any statute controlling appel-
Headnote 15 late jurisdiction. It scrupulously recognizes the statutory requirement of a "final decision" under § 1291 as a basic requirement for an appeal to the Court of Appeals. It merely administers that requirement in a practical manner in multiple claims actions and does so by rule instead of by judicial deci-
Headnote 16 sion. By its negative effect, it operates to restrict in a valid manner the number of appeals in multiple claims actions.

We reach a like conclusion as to the validity of the amended rule where the District Court acts affirmatively and thus assists in properly timing the release of final decisions in multiple claims actions. The amended rule adapts the single judicial unit theory so that it better meets the current needs of judicial administration. Just as Rule 54(b), in its original form, resulted in the release of some decisions on claims in multiple claims actions before they otherwise would have been released,[10] so amended Rule 54(b) now makes possible the release of more of such decisions subject to judicial supervision. The amended rule preserves the historic federal policy against piecemeal appeals in many cases more effectively than did the original rule.[11]

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[10] See Collins v Metro-Goldwyn Pictures Corp. 106 F2d 83 (CA2d Cir), cited in Reeves v. Beardall, 316 US 283, 86 L ed 1478, 62 S Ct 1085.

[11] See Cobbledick v United States, 309 US 323, 84 L ed 783, 60 S Ct 540.

Accordingly, the appellate jurisdiction of the Court of Appeals is sustained,[12] and its judgment denying the motion to dismiss the appeal for lack of appellate jurisdiction is

Affirmed.

Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, concurs. The concurring opinion appears *infra*, p. 794.

(2239-2)

[12] Mackey also argues that the Court of Appeals has jurisdiction under 28 USC § 1292 (1). In view of our disposition of this case, we do not reach that contention.

Office - Supreme Court, U.S.
FILED
DEC 5 1956
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 393 Misc.

RICHARD G. KING,
Petitioner,

vs.

THE CALIFORNIA COMPANY, GULF REFINING COMPANY, PLACID OIL COMPANY, TEXAS PACIFIC COAL & OIL COMPANY, AND THE DEVISEES OF SAM GROSS, DECEASED, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,

LAUB, ADAMS, FORMAN & TRULY,
City Bank Building,
Natchez, Mississippi,

ARCHIE D. GRAY,
Gulf Building,
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JONES & STRATTON,
State Bank & Trust Co. Bldg.,
Brookhaven, Mississippi,

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Of Counsel.

EARL T. THOMAS,
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900 Lamar Life Building,
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C. C. RICHMOND,
WM. R. HARRIS,
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ROBERT L. JONES,
State Bank & Trust Co. Bldg.,
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BONNER R. LANDMAN,
Deposit Guaranty Bank Bldg.,
Jackson, Mississippi,
Counsel for the Respondents.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 393 Misc.

RICHARD G. KING,
Petitioner,

vs.

THE CALIFORNIA COMPANY, GULF REFINING COMPANY, PLACID OIL COMPANY, TEXAS PACIFIC COAL & OIL COMPANY, AND THE DEVISEES OF SAM GROSS, DECEASED, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court (R. 191, 193) and the supplemental opinion entered *nunc pro tunc* (R. 228, 229) of said Court are unreported. The opinion of the United States Court of Appeals for the Fifth Circuit [App. A of Petition] is reported in 224 F. 2d 193. The opinion of said Court of Appeals, on Petition for Rehearing [App. C of Petition], is reported in 236 F. 2d 413.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether, as to an Amended Complaint claiming damages in a fixed sum [and other relief] accruing over a period from the time Petitioner first became connected with the title to a certain tract of land [September 15, 1944] to the date of filing the Complaint [May 8, 1953] arising from Respondents' continuous drilling and producing operations under an oil and gas lease as to said land, a Summary Judgment or Order entered by the District Court was a final and appealable decision or order, wherein the Court only adjudicated that Petitioner was barred from recovery of that part of said claimed damages occurring prior to November 1, 1947, and of a certain type of said claimed damages [for permanent injuries to said land] occurring prior to June 1, 1949.

Stated differently, but more pithily, the question presented is this, and only this: Whether adjudication of part of a single claim, or part of multiple claims, is a final decision under Section 1291, 28 U. S. Code.

STATUTES AND RULES INVOLVED.

The statutory provisions involved are 28 U. S. Code, Section 1291 and Section 2072, and Rule 56 (b) and (d) and Amended Rule 54 (b) of the *Federal Rules of Civil Procedure*. They are printed in App. A, *infra*, pp. 18-20.

STATEMENT.

Because Respondents differ materially with Petitioner as to many of the matters set forth in the first paragraph of his "Statement," Respondents here give their version thereof:

Petitioner initiated the litigation by filing on May 8, 1953, his Declaration [hereafter, Complaint] in the Circuit Court of Adams County, Mississippi. The requisite diversity and jurisdictional amount obtaining, Respondents removed the same to the United States District Court for the Southern District of Mississippi, Western Division.

The Complaint (R. 2-64) is a single, but un-numbered, count Complaint, consisting of 22 paragraphs, thus numbered, charging the Respondents, jointly and severally, with negligence in their operations from September 15, 1944, continuously to May 8, 1953, under an Oil and Gas Lease which was executed by a predecessor in title of Petitioner. Basically, it charges that the Respondents negligently exceeded their rights to the reasonable and necessary use of the surface of a tract of land or plantation in their drilling of 10 oil wells thereon and producing operations thereunto appertaining. Petitioner prays for damages, jointly and severally, against Respondents in the total sum of $100,-200.00.

As shown by the Complaint, after the execution of the said Oil and Gas Lease, the then owner of the land on September 15, 1944, entered into a certain contract [which the District Court construed as an Option Contract] with Petitioner to sell said land to the latter should Petitioner elect to purchase, less and except all oil, gas and other minerals, and subject to said Oil and Gas Lease, then

owned by Gulf Refining Company. In 1945, Gulf assigned an undivided one-half interest in said Oil and Gas Lease to Placid Oil Company. On November 1, 1947, Gulf, Placid and The California Company [California] entered into a certain Operating Agreement whereby California was designated [and thereafter has continued] as "Operator" of said lease, with other leases in Cranfield Field, for and on behalf, and as the agent, of said three parties thereto, and other lessees who might thereafter join. Thereafter Texas Pacific Coal & Oil Company [Texas Pacific] and Sam Gross joined said Operating Agreement. On June 1, 1949, Petitioner, electing to purchase, received a deed to said tract of land [for which he had the Option Contract], less and except the oil, gas and other minerals and subject to said Oil and Gas Lease.

In the prefatory part of the Complaint (R. 4), Petitioner charged that Respondents were doing business in Mississippi "at the time this cause of action" accrued, and that "the cause of action herein complained of" accrued from the doing of such business, and that the Court had venue of "said cause." Thereupon, Petitioner charges in Paragraphs 2 to 11, inclusive (R. 7-24), that 10 certain oil wells were drilled by Respondents on said plantation, on different dates and on different portions of said land. In Paragraphs 12 to 22, inclusive (R. 24-35), Petitioner, by repeated charges, avers that by the said drilling of said 10 oil wells and producing operations therefrom, Respondents have negligently damaged *all* of said plantation or tract of land. Illustrative excerpts from the averments in the Complaint in this regard are as follows:

In Paragraph 12 (R. 24-25), Respondents are charged with negligently erecting a "network of roads or a road system throughout the *herein described property*." and im-

properly surfacing the same with gravel and improperly draining the same; and in recklessly running heavy machinery over the fields and crops, "damaging *all* of said lands." In Paragraph 13 (R. 25-26), Respondents are alleged to have "so altered the natural drainage and watershed of said land, that *all of the land* has been deprived of a natural drainage." In Paragraph 16 (R. 27-28), Respondents are said to have so severely impaired and reduced the fertility of all of the land "that a harmful, continuing nuisance has been created on *said land.*" In Paragraph 17 (R. 28-29), Respondents are charged with the installation of a complete network of pipes "leading from one well site to another and into the various battery tanks * * * and all said pipes have not been buried under the surface of *said lands* as is required by the terms of said Lease." The Lease, last referred to, was made Exhibit A to the Complaint, with its relevant parts appearing on R. 35-36, one part being to the effect that "When required by Lessor, Lessee shall bury all pipe lines below ordinary plow depth" (R. 36).

After Respondents duly answered the Complaint (R. 64-107), Respondents then filed on November 2, 1953, their Motion for "Summary Judgment on Certain Issues" [the Order sustaining this Motion being the one from which the appeal was taken to the Court of Appeals]. To this Motion of Respondents, Petitioner on November 13, 1953, duly filed his "Answer to Motion for Summary Judgment and Cross Motion for Summary Judgment" (R. 119-136).

On December 1, 1953, Petitioner filed an Amendment to Complaint (R. 136-141) which sought specific performance as to have Respondents bury all pipes below plow depth as to all of said land, and sought, additionally and alternatively, damages. Respondents duly answered this

Amendment (R. 161-170), pleading, among other things, the execution of a Royalty Owners' Unitization Agreement to which Petitioner's grantor was a party, providing that pipes, on request, need only be buried below plow depth as to *cultivatable* land. To this Petitioner countered, not by filing an Amendment to the Complaint, or an Amended Complaint, but by filing on November 1, 1954, "Plaintiff's *Replication* to Defendants' Amendment to the Original Answer and Answer of Defendants to Amendment to Complaint" (R. 171-186). In the meantime, on July 12, 1954, Petitioner filed his "Amendment to Amendment to Bill of Complaint" (R. 170-171), wherein, in one short paragraph, he merely set forth the making of certain improvements and expenditures from September 15, 1944, to June 1, 1949.

The pleadings referred to above constitute all of the pleadings filed by all parties to the cause. On July 1, 1954, District Judge S. C. Mize rendered his Letter Opinion (R. 189-191), stating that the Motion of Respondents for Summary Judgment on Certain Issues should be sustained, and the Cross-Motion for Summary Judgment as filed by Petitioner overruled. Thereupon, on November 15, 1954, Judge Mize entered his "Order Sustaining Motion of Defendants for Summary Judgment on Certain Issues and Overruling Cross-Motion of Plaintiff for Summary Judgment" (R. 191-193), this being the Order [hereinafter sometimes referred to in this Brief as the "Summary Order"] from which the appeal was taken to the United States Court of Appeals, where the same was dismissed.

Respondents agree that the second paragraph in Petitioner's "Statement" correctly sets forth the matters covered therein.

ARGUMENT.

I.

The Complaint, Even As Amended, Sets Forth Only One Single Claim Against Respondents, and Hence, the District Court's Summary Judgment or Order Barring Petitioner from Damages for an Early Part of the Entire Damage Period and from a Certain Type of Damages for a Still Later Part of the Period, Is Not Final and Appealable, Because the Same Is Only a Partial Adjudication of and As to a Single Claim for Relief.

Petitioner seeks the issuance of the writ of certiorari largely, if not entirely, on the asserted ground that the decision of the Court of Appeals in the case at bar is in conflict with the recent decision of this Court in *Sears, Roebuck & Co.* v. *Mackey*, 348 U. S. 970 [1956]. Respondents, quite to the contrary, point out that the *Mackey* case, involving clear multiple claims, by its reasoning, makes very manifest that the decision of the Court of Appeals herein is correct.

True it is, as permitted by Amended Rule 54 (b), *Federal Rules of Civil Procedure*, and as recognized by this Court in the *Mackey* case, that the District Court may, by "express determination" and on "express direction," release for, and hence permit, an appeal "from one or more *final* decisions on individual claims, in *multiple* claims actions, without waiting for final decisions to be rendered on *all* the claims in the case." Just as conclusively was it settled in *Mackey* that the "amended rule does not apply to a single claim action" and that the fiat of the District

Judge making an "express determination" and "express direction" *"cannot,* in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of Section 1291."

The *Mackey* case involved clear multiple claims, each one separate and distinct from the other, each being stated in a separate count, and each complete within itself. The District Court therein made a final decision as to Counts I and II, and released the same for appeal by making an "express determination" and "express direction." *Mackey* was not a single claim action. It was not a case where the District Court made a partial or fragmentary adjudication as to a part or parts of a claim or claims, whether the action be a single claim or multiple claims action. The decision rendered in *Mackey* was final as to two claims, in a case involving at least two others, with the judgment entered being complete and dispositive of the first two claims —as to Counts I and II.

Quite unlike *Mackey* is the case at bar. Herein the Complaint, despite its various amendments, presents but one single claim for relief. The Court of Appeals, after this Court had decided the *Mackey* case, pithily observed that Petitioner King [Appellant there] recognized, and so declared, that only one claim was involved, as witness this excerpt from the opinion below on the Petition for Rehearing [236 F. 2d 413, at pp. 414, 415]:

> "Appellant recognized that only one claim was involved by failing to split the several elements into separate counts. It charges, 'That the *cause of action herein complained of* accrued from the doing of such business and the performing of such work * * * [and] this Court has venue of *said cause.*' [Emphasis added]. Paragraphs numbered 2 through 11 of the complaint

describe the drilling of ten oil wells on the land claimed by appellant and set up the acts of negligence or contract violation alleged to have been committed in each instance. But paragraphs 12 through 21 describe the various kinds of damage alleged to have been sustained by appellant, and all of these items of damage relate to all ten wells.

"Paragraph 22 itemizes these damages, allocating to the various elements monetary amounts adding up to $100,200.00 and no effort is made to separate the damages as to wells. The *ad damnum* paragraph of the complaint demands judgment for that amount against appellees, and again no effort is made at separation of the damages.

"Both the form and the content of the complaint demonstrate clearly that multiple claims are not involved, and the record reveals that the rulings of the Court below from which the appeal is prosecuted related to items of damage alone and not to any claim for relief."

We recognize that in the promulgation and adoption of the Federal Rules of Civil Procedure, the draftsmen evidently used the phrases "claim" or "claim for relief" hoping to escape from the "morass of decisions" concerning a "cause of action." 2 *Moore's Federal Practice* [2d Ed., 1948], Paragraph 2.06[2], p. 359. Judge Swan, in *Original Ballet Russe, Ltd.*, v. *Ballet Theatre, Inc.*, 133 F. 2d 187, 189 [2nd Cir., 1943], stated that the word "claim" was "used to denote the aggregate of operative facts which give rise to a right enforceable in the courts."

This Court, in *American Fire and Casualty Co.* v. *Finn*, 341 U. S. 6, 12, 95 L. Ed. 702, 707, 71 S. Ct. 534 [1951], in discussing the phrase, "separate and independent claim or cause of action," as delineated in Section 1441(c), 28 U. S. Code, stated:

> "We think the 'claim' set out in a petition states the facts upon which the 'cause of action' rests. For the purpose of removal, the words cover the same allegations."

In said case, this Court also quoted with approval the definition of the phrase "cause of action" theretofore given by the Court in a prior case:

> "In a suit turning on the meaning of 'cause of action,' this Court announced an accepted description. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 71 L. Ed. 1069, 47 S. Ct. 600. This Court said, p. 321:
>
> " 'Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> " 'A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.'
>
> "See *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 443, 88 L. Ed. 149, 157, 64 S. Ct. 208, 150 A. L. R. 413, 15 N. C. C. A., N. S., 529. Considering the previous history of 'separable controversy,' the broad meaning of 'cause of action,' and the congressional purpose in the revision resulting in 28 U. S. C., Section 1441 (c), we conclude that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under Section 1441 (c)."

Thus, with said guideposts, we examine the Complaint, as amended, in the case at bar. Petitioner, as the Court of Appeals noted, in the introductory paragraph of the Complaint, significantly used the words, "at the time this cause of action accrued," "that the cause of action herein complained of accrued from the doing of such business," "this Court has venue of said cause," and "for cause of complaint would show." Petitioner therefore conceived his claim or cause of action as being single throughout. The lands involved were thus described in Exhibit C to the Complaint and consisted of one plantation. Respondents were lessees, assignees or operators, as the case may be, of or under one single Oil and Gas Lease, executed by a predecessor in title of Petitioner.

True it is that Petitioner sets forth the drilling of 10 certain oil wells at different times on different parts of said plantation. After so doing, he nevertheless proceeds —as the Court of Appeals observed in its opinion on Petition for Rehearing—in Paragraphs 12 through 21 of the Complaint, to describe the various kinds of damage alleged to have been sustained by Petitioner, and all of these items of damage relate to all 10 wells. As we have set forth above under "Statement," Petitioner alleged that Respondents transcended their rights under this Oil and Gas Lease by building roads which criss-crossed the entire property. The network of pipes and pipe lines, alleged by Petitioner to have been constructed by Respondents here in excess of their rights under said Lease, again allegedly were installed and maintained throughout the entire plantation. Petitioner charged that the pollution of the streams by Respondents on said lands was done as to all streams on said lands. There was no attempt to segregate or separate claimed damage as to any particular portion of said land or as to any particular period. Petitioner alleged that Re-

spondents' acts constituted a "continuing and harmful nuisance."

The various amendments made by Petitioner to the Complaint in no way undertook to present another or different claim or cause of action. They merely sought additional relief, mostly equitable. It is well known that the type of relief sought has no significance as to whether or not a complaint states a single claim or multiple claims. Rule 54 (c), *Federal Rules of Civil Procedure;* and 1 *C. J. S.*, Actions, Sec. 68, pp. 1195-1198.

The prayer for relief forms no part of a cause of action or a claim, as was declared in *Preas* v. *Phebus et al.*, 195 F. 2d 61 [10th Cir., 1952], as follows:

> "The long and short of appellant's claim against all of the defendants, including Equity, is that he claims to be the owner of this interest and entitled to receive the oil runs therefrom. This is a claim, he asserts, against all of the appellees. Basically, there is only one wrong and only one invasion. The wrong complained of is that all of the appellees are depriving him of the possession of his property and the right to receive the oil therefrom.
>
> "True, in the prayer he prays for one form of relief against Equity and another against the remaining appellees. He asks for an accounting against Equity and that his title be quieted against the remaining appellants. But the prayer forms no part of the cause of action.[1] [See Fed. Rules Civ. Proc., Rule 54(c), 28 U. S. C. A.; *Schoonover* v. *Schoonover*, 10 Cir., 172 F. 2d 526.] One is entitled to the relief made out by the allegations of the complaint."

Thus it is that when the District Court, in the case at bar, granted Respondents' Motion for Summary Judgment on the two issues presented therein, the Court merely

held that Petitioner was not entitled to damages [one form of relief sought] of any kind against any Respondent prior to November 1, 1947, or to a certain type of damages [that is, for permanent injuries] to the land prior to June 1, 1949, as to and growing out of one single claim or cause of action. It is clear, therefore, that the Summary Judgment or Order was nothing more, and nothing less, than a partial summary judgment as defined in Rule 56 (d), *Federal Rules of Civil Procedure*, or as to "part" of a claim as defined in Rule 56 (b) of said Rules. A more accurate description of the Order as entered might be an "interlocutory summary adjudication." 6 *Moore's Federal Practice* [2d Ed., 1948], Paragraph 56.20[3], p. 2302. The Summary Judgment or Order was therefore interlocutory in character and hence, unappealable. That adjudged was only part or a parcel of one single, total claim.

The Summary Judgment or Order declared only that Petitioner "had no cause of action or right to damages of any kind or character for or on account of anything set forth in his pleadings prior to the date of November 1, 1947," and that Petitioner "had no cause of action or right for damages for any *permanent* injuries to the land and real property involved occurring prior to June 1, 1949." As to the second aspect, the Order in no way sought to debar Petitioner from claiming and proving damages to his right to the use and occupation of said lands from November 1, 1947, to June 1, 1949. That solely adjudicated by the Summary Judgment or Order pertained to Petitioner's right to damages, and only for a *part* of the total damage period [September 15, 1944, to May 8, 1953]—the first aspect of the Order debarring him absolutely as to damages for the earliest part of the period [prior to November 1, 1947], and the second aspect thereof debarring him only

as to a certain type [for permanent, as opposed to use and occupation, injuries to the land] of damages until a later date [June 1, 1949].

The amendment seeking specific performance as to the burial of the pipes below plow depth was but a formal means of praying for a specific type of relief—equitable—on "operative facts" already set out in the initial Complaint (Paragraph 17—R. 28-29), in the latter of which Petitioner alleged that "all of said pipes have not been buried under the surface of said lands as is required by the terms of said lease (Exhibit A to Complaint)."

The one-paragraph amendment (R. 170-171), filed July 12, 1954, sought no relief, but merely elaborated with evidential particulars as to the making of certain improvements and expenditures on said lands prior to June 1, 1949. The only other pleading filed by Petitioner [except his Answer to Motion for Summary Judgment and Cross-Motion for Summary Judgment] was his "Plaintiff's Replication to Defendants' Amendment to the Original Answer and Answer of Defendants to Amendment to Complaint"—palpably a replication to asserted defenses of Respondents, and not a claim for relief.

Thus it is that the Summary Judgment or Order related solely to Petitioner's partial claim for damages. Certainly it cannot be contended that a partial summary judgment—or more accurately, an "interlocutory summary adjudication"—disposing of only a part of claimed damages carved out of one single claim, or cause of action, is appealable. Manifestly, the same is but merely a pre-trial adjudication that certain issues in the case shall be deemed established for the trial of the case. 6 *Moore's Federal Practice* [2d Ed., 1948], Paragraph 56.20[4].

II.

Argumentatively Assuming That the Amended Complaint Presents Multiple Claims, Then a Summary Judgment or Order Disposing of a Part of Each of the Multiple Claims Is Clearly Non-Appealable.

If we were to assume, for the sake of argument, that the amended Complaint presented more than a single claim for relief—that is, presented multiple claims within the meaning of Rule 54(b), *Federal Rules of Civil Procedure*—then the Summary Judgment or Order appealed from would have necessarily had to be dismissed, for the reason that said Judgment or Order disposed of only a segment or portion of each of such alleged multiple claims. Said Judgment or Order, in no manner, could be said to have disposed of the totality of any one claim.

Even if this Court should now feel inclined to treat this case as a multiple claims action, still, each separate claim must be tested by Section 1291, 28 U. S. Code, as to its appealability. The appeal must be from the *whole* of such separate claim and not from a *part* of such separate claim. Whether treating this case as a single claim action or as a multiple claims action, we submit that under the *Mackey* decision, any separate claim from which there is an appeal must still be tested by Section 1291.

It will be recalled that the Complaint set forth that Respondents, jointly and severally, have, since the date of drilling of the respective 10 oil wells, been continuously transcending the rights granted under the single Oil and Gas Lease, by the building and maintenance of slush pits, the installation of a network of pipes and pipe lines across all of subject lands, the building and maintenance of

roads criss-crossing the entire lands, the pollution of all streams on said lands, and the destruction of merchantable timber on said plantation. Most assuredly, Petitioner does not contend that there are as many claims or causes of action as the number of wells multiplied by the number of days, or, more absurdly, the number of seconds in each minute in each hour of each day of the operation thereof.

Thus, if we allocate a single claim to each of the 10 wells, as Petitioner would now have us do, Petitioner has not advanced his case in one particular whatever as to make appealable and final that which is unappealable and interlocutory. But if he thereby asserts that his amended Complaint presents 10 separate, and multiple, claims, the Summary Judgment or Order would only serve to sever, as by the projection of a horizontal plane through each cause of action, all damages as to each well accruing prior to November 1, 1947, and a certain type [permanent injuries] of damages up to June 1, 1949, thus leaving outstanding and existent an alleged claim as to damages arising from and pertaining to each of said wells since June 1, 1949, to May 8, 1953, or manifestly, the majority or greater portion of the claimed damages as to said alleged separate well claim. Rule 54 (b), *Federal Rules of Civil Procedure*, did not envision an appeal being maintainable as to the fragmentary portions of each single claim asserted, whether the same be in a single claim, or multiple claims, action. Hence, with deference, the supplemental Order of the District Court in the present case, making an "express determination" and giving an "express direction," was, and is, without efficacy. Clearly, with respect, the District Judge could not make appealable that which was unappealable.

Therefore, *Sears, Roebuck & Co.* v. *Mackey*, 348 U. S. 970 [1956], is clearly inapposite and unavailing to the con-

tentions of Petitioner in the case at bar. In the cited case, the claims presented in Counts I and II were separate and independent of the claims set forth in Counts III and IV. There was not present the fragmentary adjudication of one of such claims, or one or more of said claims, as would be true in the case at bar were it a fact that the amended Complaint in the case at bar sets forth multiple claims.

Therefore, because the ultimate judgment of the Court of Appeals was that the appeal of Petitioner should be, and was, dismissed, the decision of the said Court of Appeals was correct, regardless of whether the amended Complaint set forth a single claim, or multiple claims, for relief.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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Counsel for Respondents.

APPENDIX A.

Section 1291, 28 U. S. Code, is as follows:

"Section 1291. *Final decisions of district courts*

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

* * *

Section 2072, 28 U. S. Code, is as follows:

"Section 2072. *Rules of civil procedure for district courts*

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken

effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, Section 103, 63 Stat. 104; July 18, 1949, c. 343, Section 2, 63 Stat. 446."

* * *

Rule 56 (b) and (d), *Federal Rules of Civil Procedure*, is as follows:

"(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

* * *

"(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

* * *

Amended Rule 54 (b), *Federal Rules of Civil Procedure*, is as follows:

"(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. As amended Dec. 27, 1946, effective March 19, 1948."

CERTIFICATE OF SERVICE.

I, Earl T. Thomas, one of the Attorneys of, and of counsel for, the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this, the below-noted date, I served true copies of the above and foregoing Brief for Respondents in Opposition on Petitioner, by mailing on this date such true copies respectively, in duly and properly addressed envelopes, with first class postage prepaid, to Petitioner's respective attorneys, as follows:

To: Forrest B. Jackson, Esq.
Court Square, South Building
Post Office Box 124
Jackson, Mississippi; and

To: Robert L. Netterville, Esq.
Natchez Office Building
Natchez, Mississippi.

This December 3, 1956.

EARL T. THOMAS,
Attorney and of Counsel for Respondents.

Address: 900 Lamar Life Building,
Jackson, Mississippi.